

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.288 of 2004

Reserved on : July 12, 2007

Date of decision : July 24, 2007

Jagdish	...Appellant.
Versus	
State of H.P.	...Respondent.

Coram

The Hon’ble Mr. Justice Surjit Singh, Judge.

The Hon’ble Mr. Justice Kuldeep Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

Challenge in this appeal is to the judgment of the Sessions Court whereby the appellant has been convicted of offences under Sections 302 and 201 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.3,000/-, in default of payment of fine to undergo simple imprisonment for a period of three months, in respect of offence under Section 302 IPC; and to undergo imprisonment for two years and to pay a fine of Rs.2,000/-, in default of payment of fine to undergo simple imprisonment for two months, in respect of offence under Section 201 IPC.

2. Appellant alongwith two other persons, named Patiya Ram and Pawan Kumar, was sent up for trial for offences punishable under Sections 302 and 201 IPC, for allegedly murdering one Fakiria,

Whether reporters of the local papers may be allowed to see the judgment?

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resident of village Bagpath, Tehsil Chachhroli, District Yamunanagar, and destroying the evidence of the offence of murder. The accusation was based on circumstantial evidence.

3. Prosecution version, as per record, is as follows. Deceased Fakiria used to go to different villages in the area to collect subscription/contribution for *Madarsa*. On 27th June, 2002 he left his house in connection with the aforesaid job. He accompanied by the appellant went to village Chachhroli where he attended a marriage at the house of a brother of PW-5 Subadeen. He and the appellant remained at the house of the said brother of PW-5 upto the morning of June 29. Thereafter, they left for some undisclosed place. The same day in the evening, the appellant and a man who looked like a *Maulvi* went to the *Dhaba* of PW-2 Sunil Kumar in village Sataun. PW-2 Sunil Kumar himself was not there that evening, as he had gone to Vikasnagar to see his daughter who had undergone a caesarean operation. However, his servants Ajay Bahadur, Kuldeep Singh (PW-7), Patiya Ram, a co-accused of the appellant, and Pawan Kumar, another co-accused with the appellant, were there at the *Dhaba*. The appellant and the man looking like *Maulvi* took their meals at the *Dhaba* and slept there for the night. Next morning, after taking tea, the appellant and his companion left the *Dhaba*. The same day at 10 p.m., the appellant and his aforesaid companion, who was having the appearance of a *Maulvi*, visited tea stall-cum-confectionary shop of PW-2 Sunil Kumar in village Kafota. They took tea and some saltish snacks at his shop-cum-stall and paid him Rs.10/-. Appellant enquired if they could stay for the night in that shop-cum-stall. On being told that there was no provision for night stay in the said shop-cum-stall, the two went towards Sataun. Around 11.30 or 12, the same night, one man wearing white clothes

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alighted from a truck in front of the *Dhaba* of PW-2 Sunil Kumar. He went to a nearby *Khokha* where PW-7 Kuldeep Singh, one of the servants of PW-2 Sunil Kumar, and Patiya Ram, one of the co-accused of the appellant, were sleeping. He woke them up and enquired if he could get any accommodation for night stay in the hotel (*Dhaba*). He was told that no accommodation was available and then he went away. On the next following morning around 7 a.m. Pawan Kumar, one of the co-accused of the appellant, went to PW-1 Ajay Chauhan, the son of the President of Gram Panchayat, and informed him that in a room behind the *Dhaba* of PW-2 Sunil Kumar, where he (Pawan Kumar) was employed as servant, a half burnt dead body of man was lying on a *Takhatposh* (a wooden bed). PW-1 Ajay Chauhan went to the spot and noticed the dead body. He informed the police telephonically.

4. PW-17 Inspector Gurdial Singh rushed to the spot. He recorded the statement of Ajay Chauhan, Ex. PW-1.A, under Section 154 of the Code of Criminal Procedure and sent the same to the Police Station for formal registration of the case. He took photographs of the dead body and the scene, which are Ex. P-9 and Ex. P-10. He conducted inquest and prepared reports Ex. PW-17/B and Ex. PW-17/C. The dead body lay supine. A blood stained shirt Ex. P-1 was found lying near the head of the dead body. Some burnt pieces of a gunny bag were also found on the dead body, which are Ex. P-2. The shirt and the pieces of the gunny bag were taken into possession. A pair of shoes, Ex. P-3 and Ex. P-4, was also found lying near the *Takhatposh* on which the dead body lay. The same were taken into possession. Dead body was sent for postmortem examination. Initially, the autopsy was conducted at Civil Hospital, Paonta Sahib by PW-8 Dr. S.M Ali. Following injuries were found on the dead body:

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1. There was a contused lacerated wound over the medial part of the right eye brow. The size of the wound was 4 X 0.2 Cms. The wound was covered with darkish burnt material. The colour of the wound was red.
2. There was swelling of right upper eyelid.
3. There was a lacerated wound over the medial part of left eye brow. The size of this wound was 4 X 1 Cm. It was also covered with black burnt material. There was a lacerated wound on the right side of the scalp. 10 Cm superior to mastoid process. The size of this wound was 8 Cm in length, 2 Cm Width and ½ Cm depth. The hairs were stained with blood. Blood clots were present on the face of the right side.
4. Burn injuries were found present on whole of the face.
5. Burn injuries were found on whole of the neck and chest. Bones of the left shoulder were exposed.
6. There was superficial burn injuries on whole of the left anterior and lateral part of abdomen right upper half abdomen and whole lateral right side of the abdomen.
7. Superficial burn injuries were observed on the left thigh, knee, both buttocks, male sex organ. Pubic hair was found burnt.
8. Deep burn injuries were found on both hands. Fingers were flexed like claw (hand). The finger bones of left hand were exposed.
9. Hairs of scalp were found burnt one left lower part and posterior lower part. They were singed at lower part and few other parts. Peeling of skin was present at few burnt areas. Small hair of beard were found present at some places. The dar (drugget) under the head and chest was found burnt.

Opinion as to the exact cause of death was sought from PW-12 Dr. Piyush Kapila, an expert in Forensic Medicine, employed as Registrar in IGMC, Shimla. He opined that the cause of death was two lacerated wounds found above the eyebrows.

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5. One *Taveez* (amulet) was also found on the dead body, which was taken into possession. *Taveez* was opened and it was found to contain a chit of paper on which something was written, which the police could not decipher. It was got deciphered from PW-3 Maulvi Mohammad Ishaak, who told that the words “Faquiriya son of (Bin) Mehrudee, Hamida daughter of (Bin) Latifa” were written thereon.

6. After PW-3 Maulvi Mohammad Ishaak deciphered the writing on the chit, the police came to know that the name of the deceased was Fakiria. The Police then looked for his place of residence and relatives. It came to know that he was resident of village Bagpath. The Investigating Officer went to village Bhapath in Tehsil Chachhroli of District Yamunanagar. PW-4 Israam, son of Fakiria (deceased), identified the shirt Ex. P-1, which was found near the dead body to belong to his father. He also identified the body in the photograph Ex. P-9 to be of his father Fakiria. *Taveez* Ex. P-7 was also identified by him to belong to his father.

7. Thereafter, the appellant was arrested and while in police custody he made a disclosure statement which led to recovery of *Sotha* Ex. P-6, alleged to have been used by the appellant to inflict fatal blows on the forehead of the deceased.

8. Trial Court has convicted the appellant holding that the deceased was last seen in the company of the appellant by PW-5 Subedeen, PW-7 Kuldeep Singh and PW-6 Surinder Singh, the appellant has falsely denied his being in the company of the deceased and the appellant got recovered *Sotha* Ex. P-6, even though the same is not proved to be a weapon of offence.

9. We have heard the learned counsel for the appellant as also the learned Additional Advocate General.

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10. The evidence that has come on record does not prove that the man with a *Maulvi* appearance, who was seen in the company of the appellant at Sataun on the night intervening 29th & 30th June, 2002 by PW-7 Kuldeep Singh and on 30th June, 2002 around 10 p.m. at Kafota, by PW-6 Surinder Singh, was the deceased. Dead body has been identified to be of Fakiria by PW-4 Israam, son of Fakiria, on the basis of shirt Ex. P-1, *Taveez* Ex. P-7 and photograph Ex. P-9. PW-4 Israam has not stated that Fakiria, his father, has the appearance of a *Maulvi*. PW-5 Subedeen, who has testified that the deceased and the appellant were at his brother's place in village Chachhroli from 27th June to 29th June (till morning) also does not say that Fakiria had the appearance of a *Maulvi*. Also, this witness (PW-5 Subedeen) does not say that the appellant and the deceased after leaving his brother's house in village Chachhroli went towards Sataun or they disclosed that they were going in that direction. Not only this, he even does not say that the two left the house of his brother in village Chachhroli in the company of each other or even simultaneously. What he has stated is that the appellant and the deceased stayed at his brother's house on 27th and 28th June, 2002 and on the morning of 29th June Fakiria demanded Rs.2,000/- from him but he paid him Rs.500/- only. From the statement of this witness, it cannot be gathered that the appellant and Fakiria (deceased) had any plan to go towards Sataun or that they were likely to remain together for some more time or that they left the house of the brother of the witness where marriage had been solemnized together.

11. PW-7 Kuldeep Singh does not say that the dead body that was found in a room behind the *Dhaba* of Sunil Kumar was of the man who looked like a *Maulvi* and stayed at the *Dhaba* on the night

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intervening 29th June and 30th June in the company of the appellant. Similarly, PW-6 Surinder Singh, who claims to have seen the appellant in the company of a man with *Maulvi*'s appearance at his shop-cum-tea stall in village Kafota on 30th June, 2002 around 10 p.m., does not say that the dead body that was found at Sataun in the *Dhaba* of Sunil Kumar was of the person who was in the company of the appellant and looked like a *Maulvi*. Thus, the dead body, which was found at Sataun on the morning of 1st July, 2002, does not stand established to be that of the *Maulvi* like person, who was in the company of the appellant on the night intervening 29th and 30th June, 2002 and also at 10 p.m. on 30th June, 2002, per depositions of PW-7 Kuldeep Singh and PW-6 Surinder Singh, respectively.

12. It was argued by the learned Additional Advocate General that denial by the appellant that he was seen in the company of a man looking like *Maulvi* at Sataun and Kafota by PW-7 Kuldeep Singh and PW-6 Surinder Singh, respectively, amounts to the appellant taking a false plea and this serves as missing link about the identity of deceased Fakiria as *Maulvi* like man.

13. It is true that the appellant in his statement under Section 313 of the Code of Criminal Procedure has denied that he had gone to Sataun and Kafota in the company of a person looking like a *Maulvi* and this denial does not appear to be correct because PW-7 Kuldeep Singh and PW-6 Surinder Singh have categorically stated that they had seen the appellant in the company of a *Maulvi* like man, but the prosecution cannot stretch this denial to the extent that it serves as a missing link in connecting the dead body with the man looking like *Maulvi* who was accompanying the appellant. Acceptance of this plea would mean giving the prosecution a premium for its failure to lead

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evidence to show that the dead body was that of the man looking like *Maulvi*, who was seen in the company of the appellant. It is not that there was no evidence linking the dead body with the man who was seen in the company of the appellant. As already noticed, the prosecution could have very easily proved this fact by getting the dead body identified from PW-7 Kuldeep Singh and PW-6 Surinder Singh or by getting it testified from PW-4 Israam, the son of the deceased, or PW-5 Subedeen that the deceased had the appearance of a *Maulvi*.

14. Not only that the prosecution has not led any evidence to show that the dead body was that of the man with appearance of *Maulvi* who had been seen in the company of the appellant, in fact the testimony of PW-7 Kuldeep Singh suggests that the dead body was not that of the *Maulvi* who had stayed at his master's *Dhaba* on the night intervening 29th and 30th in the company of the appellant because the witness has stated that he never saw that man or the appellant at his *Dhaba* or even at Sataun after they left the *Dhaba* on the morning of 30th June, 2002. Had the dead body been that of *Maulvi*, the witness would have definitely stated that he had seen the dead body of the man with *Maulvi* appearance in the room behind the *Dhaba* on 1st July, 2002.

15. Testimony of PW-7 Kuldeep Singh further indicates that the dead body was of a person other than the *Maulvi* like man accompanying the appellant. The witness has stated that on the night intervening 30th June and 1st July a man wearing white clothes alighted from a truck and asked for accommodation for night stay. He has stated that that man was neither the appellant nor his *Maulvi* like companion who stayed at the *Dhaba* the previous night. Now, the deceased was wearing a white shirt, which is Ex. P-1. It is quite likely that the dead body was of the man who alighted from the truck on the

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night intervening 30th June and 1st July, 2002, per deposition of PW-7 Kuldeep Singh.

16. It is not in dispute that *Sotha* Ex. P-6 has not been proved to be the weapon of offence. The doctors, who conducted the postmortem examination, namely PW-8 Dr. S.M. Ali and PW-12 Dr. Piyush Kapila, have nowhere stated that the injuries which were noticed above the eyebrows of the deceased could have been caused by means of *Sotha* Ex. P-6. In fact, PW-12 Dr. Piyush Kapila was examined as an expert witness to seek his opinion as to the cause of death and inspite of that he was not asked as to what could have been the cause of the ante-mortem injuries on the forehead (above the eyebrows). Therefore, the recovery of *Sotha* Ex. P-6, allegedly at the instance of the appellant, is of no relevance.

17. In view of the above discussion, we are of the considered view that the case against the appellant does not stand established. Consequently, the appeal is accepted. The judgment of the trial Court convicting and sentencing the appellant is set aside. The appellant is acquitted. He being in custody, serving out the sentence awarded by the trial Court in this case, is ordered to be set at liberty forthwith in case he is not required to be kept in detention in any other case.

18. Appeal stands disposed of.

(Surjit Singh), J

July 24, 2007_(sd)

(Kuldip Singh), J